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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

FLOYD T. BRYAN, and
FLOYD T. BRYAN, M.D., P.A., Petitioners,

v.

JAMES E. HOLMES REGIONAL MEDICAL CENTER,
a/k/a HOLMES REGIONAL MEDICAL CENTER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 29, 1995

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QUESTIONS PRESENTED

1. Whether a physician's evidence of "bad faith" during the peer review process is *relevant* to the determination of whether a defendant hospital is entitled to immunity under the Health Care Quality Improvement Act. 42 U.S.C.A. §§ 11101-11152.

2. In view of the HCQIA "presumption," is a defendant's compliance with HCQIA's immunity standards a question for the jury or the trial judge when there exist genuine issues of material fact, or does the HCQIA presumption create an "unusual" summary judgment standard?

3. Is a physician denied due process under the Health Care Quality Improvement Act if direct economic competitors of that physician actively participated in the peer review proceedings?

4. Whether evidence demonstrating that (a) direct economic competitors actively participated in the peer review process; (b) the peer review proceedings were conducted in bad faith; and (c) the physician's termination was motivated by improper economic reasons is sufficient to rebut the HCQIA presumption as a matter of law.

5. Does the reviewing court exceed the scope of appellate review in an HCQIA case by reweighing the trial judge's findings of fact without applying the "clearly erroneous" standard of review articulated by this court in Amadeo v. Zant, 486 U.S. 214 (1988)?

LIST OF PARTIES

The parties to the present appeal are the petitioners (collectively referred to as "petitioner"), Floyd T. Bryan and Floyd T. Bryan, M.D., P.A., and the respondent, James E. Holmes Regional Medical Center, a/k/a Holmes Regional Medical Center, Inc. The individuals listed in the style of the lower court's opinion were not involved in the appellate proceedings.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 33 F.3d 1318, and is reprinted in the appendix hereto at A.1-52.

The jury verdict in favor of petitioner, the final judgment thereon, and the trial court's orders on respondent's motions for summary judgment and new trial/judgment as a matter of law are not reported decisions, but are reprinted in the appendix, *infra.* at A.53-81; 90-93.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1337 and 1331, the petitioner brought suit in the United States District Court, Middle District of Florida against respondent for the wrongful termination of his staff privileges. On June 17, 1992, a jury rendered a verdict in favor of petitioner for $4.2 million, finding that defendant breached its bylaws and violated state and federal antitrust laws. (A.92-93) A Final Judgment was entered on June 22, 1992. (A.90-91)

Respondent appealed to the Eleventh Circuit Court of Appeals on September 23, 1992. On October 4, 1994, the Eleventh Circuit rendered an opinion reversing the jury verdict. Petitioner filed a Suggestion for Rehearing En Banc/Petition for Rehearing on October 27, 1994, which was denied on December 9, 1994. (A.87-89)

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

1. Health Care Quality Improvement Act, 42 U.S.C.A. §§ 11111(a)(1) and 11112(a), (b):

42 U.S.C.A. § 11111(a)(1):

> **§ 11111. Professional review.**
> **(a) In general**
> **(1) Limitation on damages for professional review actions**
> If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section --
> (A) the professional review body,
> (B) any person acting as a member or staff to the body;
> (C) any person under a contract of other formal agreement with the body, and
> (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable for damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action....

42 U.S.C.A. § 11112(a):

> **§ 11112. Standards for professional review actions**
> **(a) In general**
> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken --
>
> (1) in the reasonable belief that the

> action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances;
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C.A. § 11112(b):

This lengthy section is set forth in the Appendix to this petition at A.333-335.

2. Federal Rule of Civil Procedure 56(c):

> **Rule 56. Summary Judgment.**
>
> * * *
>
> **(c) Motion and Proceedings Thereon**. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

3. Federal Rule of Civil Procedure 52(a):

Rule 52. Findings by the Court; Judgment on Partial Findings.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

4. **United States Constitution Amendment VII:**

In Suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

5. **United States Constitution Amendment V:**

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This Petition for Certiorari arises out of an Eleventh Circuit Court of Appeal's opinion reversing a $4.2 million jury verdict in favor of petitioner on the ground that the hospital was entitled to immunity as a matter of law under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §§ 11101-11152.[1]

The court of appeals ruled that (1) evidence that the peer review was conducted in bad faith was *"immaterial"* to the issue of a defendant's entitlement to the HCQIA immunity, and (2) the question of a defendant's compliance with the peer review standards is never a question for the jury, even when there exist genuine issues of material fact. (A.40,45) The facts which are pertinent to this Court's review of the legal issues raised in this petition are set forth as follows.

On December 5, 1990, Floyd T. Bryan, M.D. brought suit against defendants, Holmes Regional Medical Center (HRMC), members of its medical staff, and its Board of Directors, seeking damages for the permanent termination of his staff privileges. In his complaint, plaintiff alleged that HRMC violated state and federal antitrust laws, breached its contract with Dr. Bryan, and committed numerous other violations.

The trial judge denied the hospital's motions for summary judgment and directed verdict, finding that genuine

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[1] In 1986, Congress recognized that there was a medical malpractice crisis in this country which required intervention by the federal government. 42 U.S.C.A. § 11101(1). In an attempt to alleviate this crisis and improve the quality of medical care in the United States, Congress enacted the HCQIA. In pursuit of these goals, the HCQIA encourages the medical profession to rid itself of bad doctors by providing "good faith" peer review participants immunity from money damages if they comply with the professional review standards set forth in the Act. 42 U.S.C.A. § 11112(a). Peer review, the process by which physicians, hospitals, and other health care providers scrutinize the competence of physicians, has become a critical part of health care in the United States. For peer review to be effective, physicians and hospitals need certainty in the application of the federal statutory guidelines.

issues of material fact existed as to (1) defendant's right to protection under the federal HCQIA and state immunity statutes; (2) plaintiff's federal and state antitrust claims; and (3) plaintiff's breach of contract claim. Specifically, in denying defendant's motion for summary judgment on the HCQIA immunity issue, the trial judge ruled that the evidence in Dr. Bryan's case revealed that (1) the defendant ***rejected*** the hearing panel's recommendation; (2) the hospital's reasons were pretextual; (3) there was never any evidence that Dr. Bryan had ever placed a patient's life in danger (A.94-95)[2]; and (4) Dr. Bryan's conduct was not the type of conduct ordinarily sanctioned by permanent termination. (A.61-63)

At the close of all the evidence, the hospital requested the court to instruct the jury on the HCQIA immunity. Such request was granted. (A.107-108) Significantly, *the hospital* specifically asked the court to include the question of HCQIA immunity on the Special Verdict Form.[3] The trial judge denied this request.

After considering all the evidence and weighing the credibility of all the witnesses, the jury returned a verdict finding that the hospital wrongfully terminated Dr. Bryan's medical staff privileges in violation of its bylaws. (A.92-93)

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[2] There was never any question of Dr. Bryan's competency as a surgeon. (A.96-101;102-104;106) Before the hospital terminated his privileges, Dr. Bryan had been practicing as a general and vascular surgeon for approximately seventeen (17) years. While at the hospital, Dr. Bryan achieved the highest degree of training and recognition as a vascular surgeon of any of the surgeons on staff at the hospital. In fact, at the time of his termination, Dr. Bryan was the only person at the hospital who was Board Certified in vascular surgery. (A.99)

[3] The question submitted *by the hospital* was: "Is Holmes immune from monetary damages under the provisions of the Health Care Quality Improvement Act?" (A.109) The court of appeals ruled that the jury should not decide the HCQIA immunity. However, it was the hospital itself which invited such alleged error. This Court should also note that the jury instruction on the HCQIA immunity, submitted by the hospital, specifically explained to the jury that the hospital could not be liable for damages if it complied with the standards set forth in the HCQIA. (A.108)

After appropriate jury charges, the jury also found that a conspiracy to accomplish illegal acts had been proven by the greater weight of the evidence, and that the hospital's actions were prompted by bad faith and fraud. (A.110)

The hospital filed post-trial motions for new trial and judgment as a matter of law on the HCQIA immunity. (A.84-85) The trial judge ruled that the hospital was not entitled to the HCQIA immunity as a matter of law because the weight of the evidence supported the jury verdict in favor of Dr. Bryan. (A.79-80)

The hospital appealed that part of the jury verdict addressing Dr. Bryan's breach of contract claim only. It did not appeal the jury's finding with regard to the hospital's antitrust violations. Dr. Bryan cross-appealed the trial court's finding that he did not have standing to seek treble damages under the antitrust laws. The court of appeals did not address petitioner's antitrust cross-appeal in its opinion.

The court of appeals held that, despite the jury's finding that the hospital acted in bad faith and denied Dr. Bryan due process and fairness in the peer review process, and violated state and federal antitrust laws, and despite the trial court's post-trial ruling that the hospital was not entitled to immunity, Dr. Bryan failed to rebut the "rebuttable presumption" of the HCQIA.[4] In making this determination, the appellate court dismissed Dr. Bryan's evidence of bad faith as being irrelevant (A.45), and consequently dismissed key evidence which formed the basis of the trial court's rulings and the jury's verdict.

The evidence presented by Dr. Bryan at trial established that the reasons advanced by the hospital for Dr. Bryan's termination were pretextual and nothing more than a

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[4] The American Medical Association (AMA), with a membership in excess of 280,000 physicians, filed a brief on Dr. Bryan's behalf in the court of appeals, asserting that under the facts of this case, the hospital was ***not*** protected by the HCQIA immunity and the presumption was rebutted. (A.111-127) The American Hospital Association (AHA) disagreed with the AMA's interpretation of the HCQIA, and filed a brief asserting the applicability of the HCQIA.

subterfuge. The theory of plaintiff's case was that the hospital abused the peer review process to enforce a hidden agenda against this surgeon.

Dr. Bryan's evidence established that (1) direct economic competitors, who testified that they hated Dr. Bryan, actively participated in his peer review (A.128-135); (2) Dr. Bryan repeatedly complained about substandard care rendered by the hospital and its staff (A.136-145)[5]; and (3) Dr. Bryan's style of practice was different from that of other surgeons in that he performed longer and more costly surgeries on Medicare patients which lost money for the hospital.[6] (A.146-150)

First, direct economic competitors actively participated in Dr. Bryan's peer review process. It was Dr. Gurri, a general and vascular surgeon, a former partner of Dr. Bryan's, and a direct economic competitor of Dr. Bryan, who appointed the first ad-hoc committee which began the formal investigation procedures against Dr. Bryan. (A.106,129,131) Testimony at trial and at the Chanda panel hearings at trial also established that Dr. Gurri hated Dr. Bryan. (A.128,130-131)

After the first hearing panel (Ryon/1988) threw out all prior incident reports against Dr. Bryan as being "insignificant" (many were duplicates and had been filed by the same individuals) and part of a "seriously flawed system," Dr. Gurri told the Medical Executive Committee ("MEC") that it did not have to accept the Ryon panel's findings. (A.154-159) It was also Dr. Gurri who told the MEC at a meeting held October 9, 1989 that Dr. Bryan's privileges will be terminated if Dr. Bryan has any more serious incidents. (A.160)

Thereafter, on October 19, 1989, the Board wrote a letter to Dr. Bryan (cited in court's opinion) stating that any

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[5] The Appendix contains excerpts from the evidence produced at trial and included in the record before the court of appeals.

[6] Drs. Gurri and Armstrong (members of the MEC/Board of Directors and direct economic competitors) always made disparaging comments about Dr. Bryan, especially about the fact that he took too long in surgery. Comments were repeatedly made that the length of his surgeries was unacceptable. (A.151-153)

further unprofessional behavior would result in permanent suspension. (A.161-164)[7] Among those serving on the Board of Directors at this time and actively participating in Dr. Bryan's case were Drs. Gurri and Armstrong. (A.172-174) Dr. Armstrong, a member of the hospital's Board of Directors, had also been partners with Dr. Bryan in the past, and was a general and vascular surgeon. He was a direct economic competitor of Dr. Bryan, who testified under oath that he did not like Dr. Bryan. (A.132-135) Drs. Armstrong and Gurri were friends, and considered "politically powerful" at HRMC. (A.175) After Dr. Bryan's termination, Drs. Gurri's and Armstrong's surgeries increased. (A.176-180)

In that October 19, 1989 letter, the Board chastised Dr. Bryan for complaining about the substandard care rendered by the hospital's staff. The Board stated it would not tolerate such behavior. (A.161-164)

The incidents which occurred thereafter, and used by the hospital as justification for its actions[8], involved situations where Dr. Bryan chastised assistants who were placing a patient's life in danger in the middle of surgery. These assistants had reputations in the hospital for being incompetent. For example, other surgeons at HRMC testified that Tina Stark was "slow," "inattentive," and "difficult to work with." (A.181) Mike Greene was known to be inattentive and had a bad attitude about his work. He was ultimately fired by the

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[7] Teegen, a lead member of the Ryon Panel, told the jury that the allegations made by the Board in its letter were not the findings of the Ryon hearing panel. (A.167-171)

Further, Dr. Bryan wrote a response to the Board's letter advising the Board that its alleged "'pattern of disruptive behavior' was shown, again by sworn testimony, to be largely erroneous or frivolous while 'repeated warnings and counseling' were non-existent . . ." Dr. Bryan further wrote that his only goal is to serve the community by practicing "quality vascular surgery," and because his practice as a physician "depends entirely upon the generosity of the Board, [he] pledge[s] to abide by its recommendations to the best of his ability." (A.165-166)

[8] The hospital's version of these incidents is set forth in the lower court's opinion.

hospital. (A.182-184)

Evidence also established that the hospital administration itself instigated these incident reports against Dr. Bryan. For example, the incident reports filed by Ms. Stark were dictated and typed by someone in the hospital administration. (A.185-202) The evidence also established that the day after the incident in question, Mike Greene said his hand was never hurt and the incident was no big deal. (A.203) However, several days later, Dr. Bryan was written up for "striking" the hand of Mike Greene.[9]

Nurses and physicians testified at trial that there was a conspiracy against Dr. Bryan, and that the hospital and members of its staff were "out to get" Dr. Bryan and have him "thrown off the staff." (A.208-211) Nurses were told by hospital administration to write up Dr. Bryan if he did anything, no matter what. (A.212-215) Nurses also testified that Dr. Bryan was singled out and treated differently from other surgeons on the staff at HRMC. Evidence revealed that Dr. Bryan's behavior was no different than any other surgeons at HRMC, yet Dr. Bryan would be written up where other physicians would not have been.[10] (A.216-230)

On May 19, 1990, Dr. Bryan was summarily suspended without hearing by the MEC based on these recent incidents. The MEC had a meeting at which Dr. Gurri told the committee that Dr. Bryan had a "long history of disruptive behavior."

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[9] Dr. Bryan never admitted that the incident reports as written were true. Dr. Bryan testified to the jury that while some interaction had occurred, the incident reports were exaggerated and blown out of proportion. Further, these reports arose out of situations where "the patient wasn't [being] cared for." Dr. Bryan's goal at all times was to "give good care to patients." (A.204-207)

[10] Testimony at trial established that it was normal and often necessary behavior for surgeons to raise their voices or use non-verbal communications to make a distracted nurse or technician pay attention to the critical surgery at hand. (A.231-244)

The MEC voted to permanently terminate Dr. Bryan.[11]

The second hearing panel (Chanda) which was convened to review the four incident reports relied on by the hospital as additional justification for its actions, was described by one witness as being "McCarthy-like." (A.252) Members of the Chanda panel testified at trial that the MEC and the Hospital had already made up their minds, and the panel's recommendation would make no difference in the outcome of Dr. Bryan's case. (A.253-254) At a closed meeting, the panel considered the stack of old "seriously flawed" incident reports and relied on these reports in recommending a two-year suspension.[12] Dr. Bryan was never given the opportunity to respond to this stack of incident reports. (A.265-270)

The MEC, spearheaded by direct economic competitors of Dr. Bryan (Gurri and Armstrong), rejected the hearing panel's findings and voted to permanently terminate Dr. Bryan. (A.271-278)

Dr. Bryan appealed to the Board of Directors. Under the hospital's bylaws, the Board was required to review the record upon which the MEC recommendation was based. (A.279) The Chairman of the Board testified at trial that the Board never reviewed a record. It never reviewed transcripts from the prior panels. (A.280) All the Board considered were the prior incident reports, which had been deemed to be seriously flawed by a prior hearing panel. The Board affirmed

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[11] Testimony at trial established that the incident reports (taken together) did not support Dr. Bryan's termination, and that the hospital's actions violated the AMA's Code of Ethics. (A.245-251)

[12] The hospital came to the hearing with copies for all panel members of all the incident reports ever filed against Dr. Bryan, despite the earlier hearing panel's findings that these reports were "seriously flawed" and were "insignificant," and despite the fact that the MEC had told Dr. Bryan on July 10, 1989 that these prior incident reports would be thrown out. (A.255-264)

the permanent suspension of Dr. Bryan.[13]

After Dr. Bryan's permanent termination, HRMC reported Dr. Bryan to Department of Professional Regulation ("DPR"), claiming that Dr. Bryan was an impaired physician. DPR reviewed and dismissed these charges. (A.281)

REASONS FOR GRANTING PETITION

INTRODUCTION

This case warrants Supreme Court review because it concerns the construction and application of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101-11152. The court of appeals imposed a construction on the HCQIA which is in direct conflict with the express legislative intent underlying this Act, and applied the Act in a manner which violates a litigant's right to a jury trial under the Seventh Amendment to the United States Constitution. The lower court's construction also nullifies the summary judgment standard established by Federal Rule of Civil Procedure 56(c), and violates a physician's due process rights under the Fifth Amendment to the United States Constitution.

The court of appeals' holding that bad faith is immaterial to a determination of whether a defendant has complied with the good faith peer review requirements of the HCQIA is so inconsistent with the purpose and intent of the HCQIA as to leave the meaning of this federal statute in a

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[13] In its opinion, the court held that the obligation was on Dr. Bryan to provide the Board with a full record, including transcripts of the hearing panels, despite the fact that Section 44.4.1 of the hospital's bylaws specifically states that the "Chairman of the Board shall appoint a Board review panel...to consider the record upon which the recommendation before it was made." (A.279) As apparent from footnote 18 of the opinion, this particular provision of the bylaws was overlooked by the court. (A.31)

The court also held that Dr. Bryan should have told the Board *at the time* that it was required to obtain a transcript. Such a requirement, however, would have required Dr. Bryan to guess beforehand that the Board would not follow the plain dictates of its bylaws.

state of confusion. Further, the issues decided by the lower court concerning the effect to be given the statutory presumption of the HCQIA, Section 11112(a) are issues of first impression under this Congressional Act.[14]

The HCQIA was enacted in 1986, and became effective in 1989. While there has been activity in the lower appellate courts concerning the HCQIA, the United States Supreme Court has not yet had the opportunity to squarely address the proper construction and application of the protections afforded by this Act. Further, very few, if any, plaintiff physicians in a "peer review" case survive the summary judgment and directed verdict stages of litigation to obtain a jury verdict in their favor. Under the Eleventh Circuit's recent opinion, it will now be virtually impossible for any physician to obtain a jury trial in a peer review case.

Moreover, because of the lack of Supreme Court guidance on the HCQIA, the court of appeals relied on this Court's precedent regarding the Section 1983 qualified immunity (42 U.S.C. § 1983) in devising its new procedural standards. The propriety of applying the Section 1983 qualified immunity standards to HCQIA cases is an issue of exceptional importance which should be addressed by this Court. While Section 1983 qualified immunity cases have in fact been addressed by the Supreme Court, the Supreme Court has not had the opportunity to address such a standard in the HCQIA context.

Clearly, the Eleventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The issues presented in this case are substantial, and will have a tremendous impact on today's health care industry. These issues directly affect the rights of physicians in the practice of their livelihood, as well as the rights of hospitals and other participants in the peer review

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[14] The need for guidance by this Court is further illustrated by the fact that the American Medical Association (AMA) and American Hospital Association (AHA) filed amicus briefs before the court of appeals disagreeing on the proper interpretation of the HCQIA.

process.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Lower Court Imposed a Construction on the HCQIA Which is in Direct Conflict with the Act's Express Legislative Intent, and Applied the Act in a Manner Which Violates a Litigant's Constitutional Right to a Jury Trial, as well as Nullifies the Standards Established by Federal Rule of Civil Procedure 56.

1. Bad Faith Peer Review Is Not Protected by the HCQIA.

In its opinion, the court of appeals specifically ruled that "bad faith" is irrelevant to the question of whether a hospital is entitled to HCQIA immunity. As stated by the court in its opinion:

> Bryan's assertions of hostility do not support his position that the Hospital is not entitled to the HCQIA's protections because they are ***irrelevant*** to the reasonableness standards of § 11112(a). The test is an objective one, so ***bad faith is immaterial***.

(e.s.) (A.45)

Supreme Court review of such a ruling is necessary because this ruling is ***in direct conflict*** with the very purpose of the HCQIA, which is to "encourage good faith peer review." As stated in the preamble to the HCQIA:

> **A BILL**
> [T]o encourage ***good faith*** professional review

> activities of health care entities...

H.R.5540, 99th Cong., 2d Sess., Sept. 17, 1986. (A.283)

Furthermore, it was Congress' clearly expressed intent that bad faith peer review would not be protected by the HCQIA immunity. As stated by the sponsor of the HCQIA, Representative Henry Waxman, before the House of Representatives on October 17, 1986:

> ***Bad faith*** peer review activities...could never obtain immunity under H.R. 5540.

132 Cong. Rec. H11590 (daily ed. Oct. 17, 1986) (statement by Waxman). (A.331)

The opinion further conflicts with the legislative intent behind the HCQIA in that the lower court has construed and applied the immunity provided under the Act as a ***broad*** immunity. The legislative history makes clear that the immunity under the Act was intended by Congress to be very limited and narrow. 132 Cong. Rec. H11589 (daily ed. Oct. 17, 1986) (statement by Waxman).[15] (A.329-330) In defining exactly what situations would not fall under HCQIA

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[15] One of the crucial errors in the lower court's opinion is that it relied on legislative history which was clarified by subsequent legislative review. The Energy and Commerce Committee, which sponsored the initial bill, submitted a preliminary report on September 26, 1986. (A.284-305) This is the report relied upon by the court in its opinion. Yet it was only after this initial report was submitted that the true legislative scrutiny process began. The Judiciary Committee conducted hearings on this bill in October 1986, and as a result of these hearings the bill was substantially amended. The primary purpose of these amendments was to protect physicians from abuses of the peer review system. 132 Cong. Rec. H9957 (daily ed. Oct. 14, 1986) (statement by Waxman). (A.320) These hearings, held October 8 and 9, 1986, as well as the floor debates conducted before the House of Representatives on October 14 and 17, 1986, reveal the true legislative intent behind this Act. Pertinent excerpts of this legislative history are located in the Appendix to this petition. (A.306-332)

immunity, Congress stated:

> For example, an action taken against a physician because of a ***style of practice*** or a ***pattern of patients*** that does not generate sufficient revenue for a hospital would not be covered by this bill.
>
> * * *
>
> Professional review actions taken in retaliation against whistleblowers are not protected under the bill.

(*e.s.*) 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (statement by Waxman). (A.322-323)

The lower court's opinion misinterprets and misapplies the HCQIA. The opinion indicates that as long as the hospital advances reasons for its actions, and offers some evidence in support of its reasons, it is entitled to the HCQIA immunity. The fact that it acted in bad faith is "immaterial," and the fact that the hospital's reasons may be a subterfuge for improper reasons is irrelevant.

Contrary to the court of appeals' opinion, Congress specifically recognized that while a hospital may ***say*** it was acting to further the quality of health care, and may indeed offer evidence to support its actions, the hospital is not automatically entitled to immunity. Congress recognized that the peer review process may be used as a subterfuge for other activities, in which case the immunity would not apply. As stated by Representative Waxman before the House of Representatives on October 14, 1986:

> The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions that . . . are really taken for anticompetitive purposes will not be protected under this bill.
>
> * * *

> This subsection reflects the concern that professional review actions brought for illegitimate reasons may not appear as such on their face.
>
> * * *
>
> The more serious issues arise when actions are stated to be for legitimate reasons, but are challenged as not being genuinely based on the competence or professional conduct of an individual physician.

132 Cong. Rec. H9957, H9959 (daily ed. Oct. 14, 1986) (statement by Waxman). (A.320-323)

The deliberations which occurred during the October 1986 hearings before the Judiciary Committee further reveal Congress' intent that the HCQIA immunity is a very limited immunity, as well as Congress' recognition that the health care profession is becoming more competitive every day, and a hospital's reasons for its peer review actions are not always what they appear to be:

> [Mr. GLASBERG] [W]hen some doctors decide to get rid of the doctor who is serving the . . . poor patients, they are not going to say that is why they are doing it. They are going to say they are doing it because he is not providing good services. . . . he is not providing good patient care. . . . and take a look at these records which we've dug up.
>
> * * *
>
> [Mr. GLASBERG] No hospital committee is going to expel a doctor for an expressly illegitimate reason . . .
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> * * *
>
> [Mr. WEINSTEIN] [T]he likelihood is that [the peer review] process will be abused for anticompetitive or what I could call antisocial purposes.

* * *

> [Ms. DAVIS] Is it sometimes possible that a physician will be denied privileges because a doctor's patient load has a high proportion of uninsured or indigent persons . . .
>
> [Mr. HALPER] It more likely would be an abuse if you leave in the words 'professional competency' rather than 'quality of care' . . . Quality of care is harder to define except in terms of actual procedures. 'Professional conduct' masks a lot of other types of activity.
>
> [Mr. WEINSTEIN] [T]here is very realistically such a possibility in this day and age where hospitals . . . are concerned about their profitability. We run the risk with this bill that a practitioner is going to have a negative mark reported nationwide merely because of the nature of the population that he or she serves. That is really something we do not want to encourage.
>
> [Dr. WOLFE] If a hospital tried to take action against a physician because the physician happened to be more concerned with poor people and had a practice made up more largely of poor people than someone else, that should be the subject of reward, not discipline.

Hearings on H.R. 5540 Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 2d Sess., 66,77,86,90,95,125-126 (Oct. 8 and 9, 1986). Pertinent excerpts from the transcripts of these hearings are located in the appendix to this petition. (A.306-319)

Dr. Bryan submitted evidence from which both the trial judge and a jury could find, and did in fact find, that the hospital used the peer review process as a subterfuge to

terminate him because of his style of practice and pattern of patients. The bulk of Dr. Bryan's practice involved older patients on Medicare. He was very innovative, and performed very lengthy and complicated surgeries on his patients. The evidence at trial established that such a style of practice was not profitable for the hospital. (A.146-150)

Further, Dr. Bryan often complained about the substandard care of hospital nurses and technicians, and on a few occasions other doctors. (A.136-145;207) The hospital Board even chastised Dr. Bryan in its October 1989 letter which, contrary to the hearing panel's findings, accused him of being disruptive. (A.161-171) A trier of fact could infer, and in fact did infer, from such evidence that Dr. Bryan was terminated in retaliation to his constant complaints of substandard patient care by the hospital staff.[16]

2. The Question of Whether a Defendant Complied with the Immunity Standards of Section § 11112(a) of the HCQIA Should be a Question for the Jury When There Exists a Dispute as to Genuine Issues of Fact.

Supreme Court review of the Eleventh Circuit's opinion in this case is warranted because the lower court has created a "new" standard to be applied in the litigation of HCQIA cases. The court of appeals has specifically ruled that the question of whether a defendant has complied with the four immunity standards of the HCQIA, as set forth in 42 U.S.C.A. § 11112(a), is never a question for the jury, even if there exist

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[16] Congress never intended the term "unprofessional conduct" to encompass the conduct at issue in this case. As recognized by Congress, unprofessional conduct includes "felonies or crimes of moral turpitude. . . illicit transactions involving drugs, serious sexual offenses, violent behavior, and other similar acts." 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (statement by Waxman).

genuine issues of fact.[17] As stated by the court of appeals:

> A district court should consider the issue of HCQIA immunity from damages at the summary judgment stage. If it determines that the defendant is not entitled to such protection, then the merits of the case should be submitted to the jury without reference to the immunity issue. If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special interrogatories. [citations omitted] ***Under no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury.***

(A.39-40)

According to the court, the HCQIA presumption creates an "unusual" summary judgment standard. (A.41)

Supreme Court guidance is necessary in the present case because the issues raised by the court of appeals are issues of first impression under the HCQIA:

> (1) On a motion for summary judgment, what procedural effect is to be given the statutory presumption that a defendant acted in accordance with the four immunity standards of subsection 11112(a)?
>
> (2) In view of the HCQIA presumption, is a defen-

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[17] Questions concerning "reasonableness" and "fairness under the circumstances," are classic jury questions. 42 U.S.C.A. § 11112(a).

dant's compliance with the HCQIA immunity standards a question for the trial judge or the jury when there exist genuine issues of fact?

The "new" standard created by the lower court[18] is contrary to the legislative intent underlying the HCQIA, nullifies the summary judgment standard established by Federal Rule of Civil Procedure 56, and as applied by the court, violates the Seventh Amendment to the United States Constitution.

The HCQIA does not provide that compliance with the immunity standards is a factual issue to be determined any differently from other factual issues in the case. The HCQIA simply permits the judge on an early motion to decide whether the plaintiff has come forward with sufficient evidence for a jury to find noncompliance by a preponderance of the evidence.

The Act does not suggest that, on a motion for summary judgment, the judge is to assess whether the plaintiff has met this burden of persuasion. By providing that compliance with the immunity standards is presumed unless rebutted by a preponderance of the evidence, the HCQIA indicates that once the litigation has reached the trial phase, the burden rests on the plaintiff to persuade the factfinder that the defendant did not comply with the four standards.

This interpretation is consistent with other legislative history describing the rationale for imposing a "preponderance of the evidence" standard rather than a "clear and convincing" standard. The former was favored by Congress to determine noncompliance with the immunity provisions because it was the same standard applied to the determination of other factual issues in an antitrust or breach of contract case. Second, the HCQIA does not expressly provide for judicial factfinding on compliance with the immunity standards. Third, judicial factfinding on the issue of noncompliance with HCQIA could create a conflict with the jury's factfinding on the underlying

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[18] The trial judge did not have the benefit of this new standard.

antitrust or breach of contract claims at trial. Finally, this interpretation that compliance with HCQIA's immunity standards is a jury question where the evidence shows a genuine dispute of material fact, is consistent with the allocation of decision-making functions between judge and jury on an analogous immunity question that raises factual issues of the defendants' "reasonable beliefs," namely, the issue of qualified immunity for executive officials in a civil rights action. The majority of courts hold that, to resolve the issue of qualified immunity, the judge must submit to the jury all genuine issues of fact as to what actually happened. See *Medical Peer Review, Antitrust, and the Effect of the Statutory Reform*, 50:316 MARYLAND L. REV., pp.379-381 (1991) (authored by Charity Scott) (the non-moving party's burden under the HCQIA); Note, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 COLUM. L. REV. 1045, 1051-56 (1990) (majority of courts hold that, to resolve issue of qualified immunity, the judge must submit to the jury all genuine issues of fact as to what actually happened).

The court of appeals also relied on language from the Committee Report which states that the Act "would allow a court to make a determination that the defendant has or has not met the (immunity) standards. . . ." to support its holding that it is the court, and not the jury, which determines compliance with the professional review standards of the HCQIA. H.R. Rep. No. 903, 99th Cong., 2d Sess. 12, *reprinted in* 1986 U.S.C.C.A.N. 6394. However, it is evident from the legislative intent of the HCQIA that while the creation of a presumption would allow for early resolution of frivolous or insubstantial claims, Congress clearly anticipated that the immunity issue would go to the jury if there was any issue of fact.[19] The legislature never intended to shift the normal

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[19] In response to the concerns raised by the Judiciary Committee, Representative Waxman told Congress:

> You object to the presumption regarding professional review actions that requires clear and convincing

burden of proof for civil trials.[20]

Furthermore, to support its new standard, the court of appeals erroneously relied on this Court's Section 1983 "qualified immunity" line of cases. (A.39) However, modern qualified immunity standards do not change the standard for the availability of summary disposition. If there is no genuine dispute as to what happened, the judge may not withhold summary disposition; if there is a factual dispute, however, it must be resolved by the jury. If plaintiff's version of the facts would not give rise to immunity, while defendant's version would, and a genuine issue of fact is created, the trial judge must submit to the jury all genuine issues of fact relevant to the qualified immunity issue. The Section 1983 qualified immunity, or the "rebuttable presumption" in HCQIA cases, allows for early disposition of frivolous or insubstantial lawsuits only - - not for substantive lawsuits in which a plaintiff is able to create an inference of fact. See McSurely

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> evidence. You suggest that it would create needless complexity ***in the minds of the jury*** to apply different standards, thereby adding to the confusion and potential delay of a peer review trial in court . . . I have modified the presumption to substitute the clear and convincing evidence test with a preponderance of the evidence test . . . Such a step should simplify the immunity provisions.

(e.s.) 132 Cong. Rec. H11590 (daily ed. Oct. 17, 1986) (statement by Rep. Waxman). (A.331-332)

[20] In clarifying that the standards are not to be pleaded and proved by the defendant as an affirmative defense, the Legislature stated:

> Such an interpretation would have shifted the normal burden of proof for civil trials and was never intended by the Committee on Energy and Commerce.

132 Cong. Rec. H9958 (daily ed. Oct. 14, 1986) (statement by Rep. Waxman). (A.321) Further, one of the purposes of the Act was to lessen litigation complexity. See 132 Cong. Rec. H11590 (daily ed. Oct. 17, 1986) (statement of Rep. Edwards). (A.331-332) The new standard imposed by the court of appeals is in conflict with such purpose.

v. McClellan, 697 F.2d 309 (D.C.Cir. 1982) (Harlow does not propose to change the operation of Rule 56 in immunity cases. . . . When there is a genuine issue of fact . . . Rule 56 compels a trial). This Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), acknowledged that "disputed questions of fact ordinarily may not be decided on motions for summary judgment."

The Supreme Court in Mitchell v. Forsyth, 472 U.S. 511 (1985), is even clearer when it states:

> [I]f the plaintiff's complaint adequately acknowledges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery ***fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.***

If discovery does create a factual issue, Mitchell explicitly envisions that the suit proceed to trial:

> At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability.

The court of appeals' opinion misconstrues Supreme Court precedent regarding the Section 1983 qualified immunity standards. The Supreme Court never intended to depart from standards governing the availability of summary judgment and trial by jury. The Court's qualified immunity cases indicate that the Court intended to leave to the jury only that which cannot constitutionally be withheld from the jury. Any other ruling is incompatible with Rule 56 and the Seventh Amendment.

The court of appeals' application of the federal statute in this case violates the Seventh Amendment to the United States Constitution. If either party demands a jury trial, the Seventh Amendment prohibits the trial court from engaging in fact identification. See e.g., In re Peterson, 253 U.S. 300, 312

(1920) ("The limitation imposed by the [Seventh] Amendment is that . . . the ultimate determination of issues of fact by the jury not be interfered with."). In a case in which plaintiff's version of the facts would not give rise to qualified immunity, but defendant's version would, and a genuine issue exists as to which version is correct, the jury must resolve those factual issues.

The lower court cites Islami v. Covenant Medical Center, Inc., 822 F.Supp. 1361 (N.D.Iowa 1992) as additional support of its "new" standard under the HCQIA. However, Islami clearly mandates affirmance of Dr. Bryan's case.[21]

In Islami, the court held that evidence in a doctor's lawsuit against a hospital for suspension of staff privileges raised jury issues as to whether procedures defendants afforded to the doctor were "fair under the circumstances," and precluded summary judgment on a breach of contract claim and on the issue of whether defendants were entitled to immunity under the HCQIA. The court held that "'fairness based on the circumstances' is the paradigm jury question." As stated by the court:

> The factual circumstances are complicated and hotly disputed in this case. For the court to say whether the proceedings were fair under the circumstances at this juncture would require the court to draw numerous inferences and weigh the evidence of the parties; a process which is anathema to summary judgment decisions.
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> The Court implies that the extraordinary case still may go to the jury for some help. This case is extraordinary because the decision on

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[21] Islami also illustrates the confusion among the lower federal courts as to the proper legal standard to be applied in HCQIA cases. Islami, 822 F.Supp at 1377-1379, citing Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) and Fobbs v. Holy Cross Health System Corp., 789 F.Supp. 1054 (E.D.Cal. 1992) (advancing different summary judgment standards when HCQIA an issue).

> immunity is hopelessly intertwined with a decision on the merits of the contract claim which this court already has found cannot be decided by summary judgment.
>
> * * *
>
> [t]heir failure to carefully follow the by-laws and HCQIA generates a jury issue.

Islami, 822 F.Supp. at 1361, 1374, 1378-79.[22]

3. A Physician Cannot Be Afforded Due Process under the HCQIA as a Matter of Law if Direct Economic Competitors of that Physician Actively Participated in the Peer Review Proceedings.

As set forth at pages 9-12 of this petition, direct economic competitors instigated review of Dr. Bryan, and direct economic competitors were responsible for his permanent termination from the hospital staff.

In enacting the HCQIA, Congress made clear that a physician must receive ***unbiased review*** in the peer review process. As stated in its legislative history:

> In any case, it is the Committee's intent that physicians receive ***fair and unbiased review*** to protect their reputations and medical practices.

(e.s.) H.R. No. 99-903, 99th Cong., 2d Sess., p.6393.

The HCQIA provides that in order for a professional review body to have immunity, it must comply not only with the "reasonable belief" requirements of the Act, but also due process. As stated in 42 U.S.C.A. 11112(a)(3), a professional

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[22] Even if the court of appeals' "new" standard is ultimately considered to be the proper standard to be applied in HCQIA cases, that standard was misapplied by the court of appeals in the present case.

review action must be taken:

> (3) after adequate notice and hearing procedures are afforded to the physician involved or ***after such other procedures as are fair to the physician under the circumstances.***

The HCQIA also provides that the hearing panel must be impartial and fair in evaluating a physician's behavior. As stated in 42 U.S.C.A. § 11112(b)(3)(A)(iii):

> (A) subject to paragraph (b), the hearing shall be held . . .
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> * * *
>
> (iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.

When drafting this portion of the statute, Congress anticipated that the hearing panel would be the entity who, after weighing the evidence, made the decision as to what action should be taken against a physician based on the evidence. In this case, the MEC and Board of Directors, spearheaded by Drs. Gurri and Armstrong, direct economic competitors of Dr. Bryan who actively participated in Dr. Bryan's peer review, rejected the hearing panel's recommendation and permanently terminated Dr. Bryan's privileges. This is not "fair and unbiased" review and is in direct violation of the HCQIA. The "fair and unbiased" review requirements of the HCQIA should apply to all phases of the peer review proceedings.[23] To interpret the HCQIA, a federal statute, to

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[23] Furthermore, the hospital's own bylaws specifically recognize that a doctor cannot receive "fair and unbiased" review if direct economic competitors participate in the peer review. As provided in Section 10.2.12 of the hospital's bylaws (A.282):

> In any instance where a member of the Executive

mean that a physician can be afforded due process in the peer review process despite the fact that direct economic competitors actively participated in his peer review constitutes a violation of a physician's fundamental due process rights under the United States Constitution.

4. Dr. Bryan Rebutted the HCQIA Presumption as a Matter of Law.

Also worthy of this Court's consideration is the following issue raised by the court of appeal's opinion: If a plaintiff comes forward with some evidence to rebut the statutory presumption, what is the test for determining whether such evidence is sufficient to rebut the presumption and avoid summary judgment? The Act does not set forth such a test.

Evidence demonstrating that (a) direct economic competitors actively participated in the peer review process; (b) the peer review proceedings were conducted in bad faith; and (c) permanent termination was motivated by improper economic reasons should be sufficient to rebut the HCQIA presumption as a matter of law.

No matter what standard is applied, Dr. Bryan clearly rebutted the HCQIA presumption. Evidence at trial demonstrated that (1) direct economic competitors, who testified that they hated Dr. Bryan, actively participated in his peer review (A.128-135); (2) Dr. Bryan repeatedly complained about substandard care rendered by the hospital and its staff, and Dr. Bryan was terminated in retaliation to his whistleblowing (A.136-145); and (3) Dr. Bryan's style of practice was different from that of other surgeons in that he performed longer and more costly surgeries on Medicare patients which

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> Committee has a conflict of interest in any matter involving another appointee to the staff . . . that member shall not participate in the discussion or voting on the matter.

The jury found that the hospital violated its own bylaws inasmuch as direct economic competitors actively participated in Dr. Bryan's peer review.

lost money for the hospital. (A.146-153)

As in Islami, supra, Dr. Bryan demonstrated that a reasonable jury could find that he has shown by a preponderance of the evidence that the defendants did not provide him with fair and adequate process under the circumstances, and that defendants did not act in the reasonable belief that its action was to further quality health care.

The factual circumstances were complicated and hotly disputed in this case, and there can be no question that the decision on immunity was "hopelessly intertwined" with the merits of Dr. Bryan's contract and antitrust claims. For the court to say whether the defendant acted in the "reasonable relief" that it was furthering "quality health care," or that Dr. Bryan received fair treatment under the circumstances, requires a court to draw numerous inferences and weigh the credibility of the witnesses presented by the parties. This is a process which is anathema to summary judgment.

The jury heard the evidence presented by both parties, including the hospital's evidence as set forth in the lower court's opinion, and the jury found by a preponderance of the evidence that Dr. Bryan was not treated fairly, given the entire factual circumstances of this case, and that the hospital had breached its own bylaws and violated antitrust laws. Further, the trial judge decided the immunity issue as a matter of law when it denied the hospital's motions for summary judgment, directed verdict, and judgment as a matter of law, finding that genuine issues of material fact existed as to (1) defendant's right to protection under federal and state immunity statutes; (2) federal and state antitrust claims; and (3) plaintiffs' breach of contract claim.

II. THE LOWER COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION.

The lower court violated fundamental standards of review established by the United States Supreme Court. First, the law is well established that on a motion for summary judgment, directed verdict, or judgment as a matter of law, the evidence is to be viewed in the light most favorable to the prevailing party - - in this case Dr. Bryan, who obtained a jury verdict in his favor. The prevailing party is to be given the benefit of all favorable inferences drawn from the evidence; and conflicts of the evidence are to be resolved in the prevailing party's favor. The weighing of the evidence is within the exclusive province of the trier of fact, and is beyond the scope of appellate review. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The court of appeals has held in its opinion that issues of fact regarding a defendant's compliance with the HCQIA standards of "reasonable belief" and due process should be decided by the trial judge. The trial judge in this case weighed the facts at the summary judgment and directed verdict stages, and determined that the hospital was not entitled to immunity as a matter of law because the defendants' compliance with the professional review standards of the HCQIA was a question of fact. The trial judge let the issues of fairness, due process, and "reasonable belief" go to the jury. These issues formed the basis of plaintiff's breach of contract and antitrust counts. As in Islami, the plaintiff's breach of contract and antitrust counts were "intertwined" with the issue of whether the hospital complied with the "reasonable belief" and due process requirements of the HCQIA. After the verdict, and the hospital's motions for new trial and judgment as a matter of law based on the HCQIA, the trial judge again weighed the evidence and determined that the weight of the evidence supported the jury verdict. After weighing the facts, the trial judge found that the defendant hospital was therefore not entitled to HCQIA immunity as a matter of law. (A.79-80,84-85)

Inasmuch as the trial judge's determination on the HCQIA immunity issue is dependent on his findings of fact, the appropriate standard of review is the "clearly erroneous" standard. Federal Rule of Civil Procedure 52(a) states as follows:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.[24]

See also Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986) (applying Fed. R. Civ. P. 52(a) standard); Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) ("clearly erroneous" standard applied to district court findings re § 1983 qualified immunity).

In this case, the court of appeals offered factual rather than legal grounds for its reversal of the district court's findings and the jury verdict.[25] The court in its opinion never identified the standard of review it was applying to the district court's factual findings. The United States Supreme Court has

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[24] This rule is based upon the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district court in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority. Advisory Committee Notes, 1985 Amendment to Fed. R. Civ. P. 52(a).

[25] The court of appeals also departed from the usual course of proceedings in that it did not consider any of the evidence presented at trial concerning defendant's antitrust violations. The court of appeals believed that because its decision was premised on the HCQIA immunity, it was unnecessary to consider such evidence. (A.51-52) Certainly any evidence of antitrust violations would be relevant to the issue of whether the hospital complied with the "good faith" and/or "reasonable belief" peer review requirements of the HCQIA.

held that a court of appeals' failure to properly apply this standard is improper and constitutes reversible error. As stated by the United States Supreme Court in Amadeo v. Zant, 486 U.S. 214, 224 (1988):

> It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact ***only*** if they are 'clearly erroneous,' and that it must give 'due regard' . . . to the opportunity of the trial judge to judge the credibility of the witnesses. Fed. R. Civ. Proc. 52(a) . . .
>
> We have stressed that the clearly erroneous standard of review is a deferential one explaining that 'if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. . . .[26]

As in Amadeo, the court of appeals in this case failed to properly apply the "clearly erroneous" standard of review and therefore committed reversible error. This particular issue is worthy of this Court's consideration inasmuch as the issue of whether the "clearly erroneous" standard is applicable to a district court's findings regarding the HCQIA immunity is of exceptional importance and has yet to be addressed by this Court.

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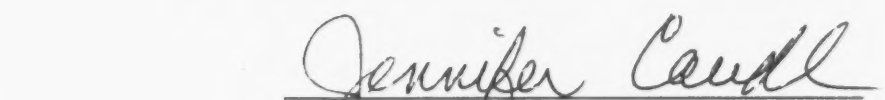
[26] The Supreme Court also held that the district court need not detail the basis for its factual conclusions. As stated in Amadeo:

> The district court's lack of precision, however, is no excuse for the court of appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate fact-finding.

CONCLUSION

The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Peer review has become a critical part of the health care industry in the United States. For peer review to be effective, physicians and hospitals require certainty in the construction and application of federal statutory guidelines. The court of appeals' decision leaves the intent and meaning of the HCQIA in a state of confusion. The court of appeals' new procedural standard to be applied in the litigation of HCQIA cases raises an issue of first impression under this federal statute. Because of the major implications of the court of appeal's decision, and because of the need for the Supreme Court's guidance on the proper construction and application of the HCQIA, petitioners respectfully request this court to grant this petition for writ of certiorari.

Respectfully submitted,



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